Supreme Court, U. S.
FILED
AUG 13 1980
MICHAEL RODAK, JR., CLERK

No. 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Attorneys for Petitioner
National Broadcasting Company, Inc.

Of Counsel:

HOWARD MONDERER
Vice President, Law
National Broadcasting
Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

August 13, 1980

Questions Presented

1. Whether Section 312(a)(7) of the Communications Act, interpreted in keeping with its legislative history and the First Amendment to the United States Constitution, provides an individual right of access to broadcast facilities to candidates for federal office?

2. Whether Section 312(a)(7) of the Communications Act was properly interpreted, consistent with Articles I and II and the First and Fifth Amendments of the United States Constitution, to empower the FCC to determine when a federal election campaign has begun and to assess the "needs of an individual candidate" for election in connection with the application of that section to television broadcasting?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Reference to Administrative Rulings and Opinions Below	1
Jurisdictional Statement	2
Constitutional and Statutory Provisions	3
Statement of the Case	3
(i) The Committee's Request for Broadcast Time	4
(ii) Commission Proceedings	4
(iii) The Decision of the Court of Appeals	8
Reasons for Granting the Writ	10
The Decision Below Raises Significant and Recurring Constitutional Issues Affecting the Federal Electoral Process and the Broadcasting System	10
The Decision Below Is Contrary to the Legislative History of Section 312(a)(7)	21

Table of Authorities

Cases:

PAGE

Accuracy in Media, Inc. v. *FCC*, 521 F.2d 288 (1975), *cert. denied*, 425 U.S. 934 (1976) 19

Buckley v. *Valeo*, 424 U.S. 1 (1976) 16

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 9n, 16, 17-18, 19, 27

Community-Service Broadcasting of Mid-America, Inc. v. *FCC*, 593 F.2d 1102 (1978) 20

Farmers Educational & Cooperative Union of America v. *WDAY, Inc.*, 360 U.S. 525 (1959) 17n

Kennedy for President Committee v. *FCC*, No. 80-1549 (D.C. Cir. May 31, 1980) 3n

Kennedy for President Committee v. *FCC*, No. 80-1482 (D.C. Cir. May 31, 1980) 3n, 18n

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 17

Shelton v. *Tucker*, 364 U.S. 479 (1960) 20

United States Civil Service Commission v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) 16n

Administrative Decisions:

Humphrey for President Campaign, 34 F.C.C.2d 471 (1972) 17, 23

Anthony R. Martin-Trigona, 66 F.C.C.2d 968 (1977), *petition for reconsideration denied*, 67 F.C.C.2d 743 (1978) 12n

Congressional Documents: PAGE

Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) 21n, 22n, 23n, 24n, 25n, 26n

Federal Election Campaign Act of 1971: Hearings on S.382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 92d Cong., 1st Sess. (1971) 25n

Remarks of Sen. Dole, 117 Cong. Rec. 30075 (1971)..... 21n

S.Rep.No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773 ....21n, 23n, 24n 25n, 26n

S.Rep.No. 229, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1821 .....21n, 23n, 25n

Constitutional Provisions:

U.S. Const.
Amend. I .....*passim*
Amend. XII .....generally
Art. I, § 2 .....generally
Art. I, § 3 .....generally
Art. I, § 4 ..... 12n
Art. I, § 5 ..... 12n
Art. I, § 8 .....generally
Art. II 12n

Statutes:

Communications Act
§ 3(h), 47 U.S.C. § 153(h) (1976) 19n, 21n
§ 312(a)(7), 47 U.S.C. § 312(a)(7) (1976) .....*passim*
§ 315, 47 U.S.C. § 315(a) (1976).....5n, 18-18n, 21, 21n, 23n
§ 402, 47 U.S.C. § 402 (1976) 3n

PAGE

Judicial Code

28 U.S.C. § 1254(1) (1976) 2

Hatch Act

5 U.S.C. § 7324 (1976) 16n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reference to Administrative Rulings and Opinions Below

The Memorandum Decision of the Court of Appeals, per Bazelon, C.J., was filed on March 14, 1980. Circuit Judge Tamm filed a separate concurring opinion. The opinions are not yet officially reported and are reproduced in the Joint Appendix, commencing at p. 1a.* A petition for rehearing was denied on May 15, 1980. The Memorandum Opinion and Order of the Federal Communications Com-

---

* The appendix required by Sup.Ct.R. 21(k) has been submitted jointly by the petitioners CBS, Inc. ("CBS"), American Broadcasting Companies, Inc. ("ABC") and NBC and is hereafter abbreviated as "JA." The appendix has been filed under docket number 80-207.

mission ("FCC" or "Commission") adopted November 20, 1979 and released November 21, 1979 is reported at 74 F.C.C.2d 631 (1979), and is reproduced beginning at page 69a of the Joint Appendix; the Memorandum Opinion and Order of the FCC on rehearing adopted and released on November 28, 1979 is reported at 74 F.C.C.2d 657 (1979) and is reproduced beginning at page 110a of the Joint Appendix.*

Jurisdictional Statement

The judgment of the Court of Appeals affirming the orders of the FCC was entered on March 14, 1980. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by the National Broadcasting Company, Inc. ("NBC") on April 18, 1980, the time to file such motion having been extended by the Court of Appeals. The motion for rehearing was denied on May 15, 1980 (JA 153a).** This Court's jurisdiction is invoked pursuant to 28 U.S.C § 1254(1) (1976).

---

* The parties which participated in the proceedings below were: American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc. (as petitioners to the Court of Appeals); the Federal Communications Commission and the United States of America (as Respondents in the Court of Appeals) and the National Association of Broadcasters and Carter-Mondale Presidential Committee, Inc. (as Intervenors in support of Petitioners and Respondents, respectively).

** Circuit Judge MacKinnan would have granted the suggestion for rehearing *en banc* (JA 153a).

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions are set forth in an addendum to this petition. The principal statutory provision involved in this case is 47 U.S.C. § 312(a)(7) (1976), which provides in pertinent part:

> "(a) The [Federal Communications] Commission may revoke any station license or construction permit . . .
>
> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Statement of the Case

The petition in this case seeks review of a decision by the Court of Appeals which affirmed a determination made by the FCC that NBC had failed to comply with Section 312(a)(7) of the Communications Act when it declined to sell to the Carter-Mondale Presidential Committee, Inc. ("Committee") one half-hour of broadcast time on any of four consecutive dates in December, 1979, chosen by the Committee.* The opinions of the Court of Appeals represented the first detailed analysis by the judiciary of the contours of the section.**

---

* The Court of Appeals had jurisdiction over the petition of NBC pursuant to 47 U.S.C. § 402 (1976).

** The United States Court of Appeals for the District of Columbia has referred to its decision in this case in two subsequent decisions. *See Kennedy for President Committee* v. *FCC*, No. 80-1549 (D.C.Cir. May 31, 1980); *Kennedy for President Committee* v. *FCC*, No. 80-1482 (D.C. Cir. May 31, 1980); both opinions were filed August 6, 1980.

(i) *The Committee's Request for Broadcast Time*

The Carter-Mondale Committee nad, on October 11, 1979, asked each of the three television networks to sell it a half-hour of time between 8 p.m. and 10:30 p.m. on December 4, 5, 6 or 7, 1979. NBC declined to sell the requested time. It explained in a letter to the Committee that it had carefully evaluated the request, but had concluded that the earliness of the request (judged by NBC's experience), the multiplicity of federal candidates at that stage of the campaign process (122 were listed with the Federal Election Commission at that time), combined with NBC's obligation under Section 315(a) of the Communications Act to provide equal half-hour time periods to all candidates requesting it should NBC agree to sell time to the Committee, were all factors in its decision. The other television networks declined similar requests made by the Committee. CBS offered the Committee five minutes of time which was refused;* ABC declined to offer any time in December, but offered time in January. This too was refused. NBC did not make a counter-offer since the Committee had made clear that no other time period or date would be acceptable to it.

(ii) *Commission Proceedings*

On October 29, 1979 the Committee filed a complaint with the FCC against each of the networks. On November 5, 1979 NBC filed its response, restating its reasons for declining to make the requested time available.**

---

* Subsequently, as a result of the Iranian hostage situation, the Carter Committee made a new request for five minutes of broadcast time for December 4, 1979. CBS agreed to this request and the Committee broadcast a message on that date. NBC later offered a 30-minute time period in January, an offer declined by the Committee, which accepted the time from ABC instead (JA 11a). All of the parties below as well as the Court of Appeals agreed that these circumstances did not moot the controversy with respect to the original request (JA 52-54a).

** NBC pointed out to the Commission, as it had to the Committee, that the request sought national broadcast time nearly a

[*Footnote continued on following page*]

The Commission, in its first order in this case (JA 69a) ruled, in a 4-3 decision, that the networks had violated Section 312(a)(7). While recognizing that the statutory language does not define the scope of the FCC's responsibilities under Section 312(a)(7) or the procedures to enforce them (JA 78a) and that the statute's legislative history does little to clarify these responsibilities (*id.*), the Commission determined that in applying Section 312(a)(7) the "factors which we consider relevant" are: "the candidate's needs, the number of candidates, and the availability of classes of time" (JA 87a). It added, however, that "particular emphasis" was placed by it on the "candidate's needs" (*id.*) and found that NBC had failed to apply the appropriate standards, in that NBC had "apparently given no consideration to the Committee's determination that 'the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office . . .'" (JA 91a). The Commission noted, in this connection, however, that while the "licensee is not simply to substitute its judgment for the candidate's own assessment of these needs . . . the licensee does retain some discretion to evaluate the reasonableness of that assessment in the broad sense and to weigh that factor against others which we have said are relevant" (JA 88a).

[*Footnote continued from preceding page*]

year before the general election, at a stage of the process where "the campaigns waged by the presidential candidates are on a state by state basis". It had suggested to the Committee that the needs of the candidates with respect to such state events could be met by local stations; NBC also referred to the extensive news program coverage accorded President Carter. NBC emphasized the particular burdens the equal time provisions of 47 U.S.C. § 315(a) would pose for it during the month of December when it had scheduled a total of only 7 half-hour program positions (as compared to programs of one or two hours in length) for the period subsequent to December 7, 1979 (the last date requested by the Committee).

The Commission held that the 1980 presidential campaign had "begun much earlier than previous campaigns" (JA 92a) and it could "not find that NBC acted reasonably in concluding that a national campaign ha[d] not yet begun" (JA 94a). It found other bases offered by NBC in support of its position to be unacceptable. Thus, although it concluded that NBC's concerns as to the impact the multiplicity of candidates would have on equal time concerns were relevant, they were unwarranted here inasmuch as only a small percentage of potential candidates would likely qualify or have the financial resources to purchase the time sought (JA 96a). The Commission declined to consider the constitutionality of the statute as applied, stating that such considerations were for the courts (JA 90a; *see also* 123a).

On the next business day after release of the order, NBC sought reconsideration and a stay pending judicial review. In urging reconsideration, NBC noted that it had in fact considered fully the President's expressed needs as well as the needs of Presidential candidates generally prior to its original decision, and had, in light of the Commission's decision, reconsidered these needs along with all other relevant factors. NBC informed the Commission that, in light of that assessment, it believed its decision not to sell the particular time requested by the Committee was not unreasonable. It also pointed out what it believed to be the misinterpretation of the legislative history inherent in the Commission's construction of the statute and the constitutional problems which such construction posed.

On November 28, 1979, by the same 4-3 vote, the FCC denied the motion for reconsideration and declined to stay its order. Its memorandum opinion and order of that date (the "Supplemental Order") described the reasons advanced for the denial of these motions and sought to clarify

the Commission's position on a number of issues raised in the request for reconsideration (JA 110-42a).

The Supplemental Order altered somewhat the FCC's description of the "candidate's needs" factor in the evaluation process, disclaiming any intention to require "broadcasters to make an assessment of individual candidate's needs insofar as they solely relate to the candidate's subjective, personal, or immediate 'political' desires" (JA 127a). The Supplemental Order did not explain what the "needs" factor does involve nor how it is to be used in the evaluation or "weighing" process referred to by the Commission. The Commission also stated, for the first time, its view that a determination of *when* the reasonable access requirement attached was a purely objective matter as to which the Commission itself would make an independent determination. (*See* JA 124a and the separate statement of Commissioner Brown at JA 144a; *compare* the original Commission decision at JA 94 referring to an assessment of the broadcaster's "reasonableness" in this respect). It also indicated, again for the first time, that special weight was to be accorded to the fact that a specific request was the candidate's first request in a particular campaign (JA 126a). Indeed, Commissioner Brown, a necessary vote in creating the majority, stated that absent *compelling* reasons, a licensee would always be unreasonable if it did not honor a first request (Statement of Commissioner Brown at JA 146a).

In its Supplemental Order the FCC stated that the networks were obligated to inform the Commission of how they intended to comply with Section 312(a)(7) by the close of business, November 29, 1979, noting that it would examine those responses to see if the networks' "conduct reflect[s] a further failure to meet obligations" and that it would then decide if any "specific measures may be required to remedy

any continued failure to comply with Section 312(a)(7)" (JA 142a).*

(iii) *The Decision of the Court of Appeals*

NBC filed a petition for review in the Court of Appeals on November 29, 1979; it also sought a stay of the Commission's decision, which was granted, as was an expedited hearing.

On March 14, 1980 the Court of Appeals entered judgment affirming the orders of the Commission. The panel which heard the appeal, in an opinion written by Chief Judge Bazelon, found that notwithstanding the Commission's view that the statute's language did not expressly define the scope of the FCC's responsibilities and that the legislative history provided little or no guidance, the "plain meaning" of Section 312(a)(7), as well as its legislative history, created an individual right of access to candidates seeking federal office (JA 15-20a). Judge Bazelon's opinion analyzed and found to be reasonable the FCC's implementation of Section 312(a)(7). He expressly affirmed the authority of the FCC to determine when a Federal election

---

* Commissioners Lee, Washburn and Jones dissented. Commissioner Lee noted that the decision simply does not leave "broadcast discretion with the network" as the majority asserted. "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority." (JA 149-50, footnote omitted). Commissioner Lee also stated that the reasons offered by the networks "thoughtfully included consideration of the needs of candidates, the public and the networks . . ." *id.* at n.1.

Commissioner Washburn stated that the majority decision improperly emphasized the "candidate's need" standard and "substitute[d] the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto". The dissent called this "governmental intrusion" "illegal" and expressed concern about its "far-reaching consequences that will come back to haunt the Commission and the public again and again" (JA 151a).

campaign begins (JA 29a) and concluded that the Commission was correct in finding that the networks had "unreasonably failed to grant access as required in Section 312(a)(7)" (JA 41a). The court, as had the FCC, characterized the networks' action as an "across-the-board ban on candidate access" (JA 34a). The court found, in addition, that NBC is obligated to accede to the FCC's mandate that, "in addressing a request for access from a candidate for federal office, the broadcaster ha[s] to tailor his response to the *individual* candidate" (JA 39-40a, footnote omitted; emphasis in original).*

While the Commission had declined to consider the constitutionality of Section 312(a)(7), the Court of Appeals found the provision to be constitutional as implemented by the FCC. Rejecting the arguments raised by the networks, it found that the Commission's role in determining when a campaign has begun does not constitute an impermissible involvement in the electoral process (JA 27a) and that the Commission's orders do not impinge on editorial discretion or inject government into the decisional processes of broadcasting (JA 46-47a). Although recognizing that the actions of the FCC "in these cases were not flawless" and that "the agency failed to headline its policy as clearly as it might have," (JA 42a), the Court of Appeals held that the Commission satisfied the criteria for "reasoned decision-making" required of administrative decisions (*id.*).

Circuit Judge Tamm filed a separate concurrence. He expressed throughout his opinion a pointed concern that the Commission's decision raised the specter of improper intrusion into the electoral process and improper interfer-

---

* In reaching its decision, the court dismissed as mere "dictum" the conclusion of this Court in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) that Section 312(a)(7) "essentially codified" the Commission's prior interpretation of §315(a) (JA 20a-21a).

ence with First Amendment rights. Thus he stated at the outset of his opinion:

> "When government regulation of our system of freedom of expression calls for a federal agency to decide whether and to what extent the 'individual needs' of particular candidates for federal office demand that they be heard on the radio and television airwaves, the danger of nonneutral government decisionmaking raises grave First Amendment concerns" (JA 56a, footnote omitted).

And again

> "Thus, section 312(a)(7), as implemented by the Commission, stands precariously on the First Amendment tightrope. It raises the serious danger of nonneutral government favoring one speaker or viewpoint over another" (JA 67a).

Judge Tamm ultimately concluded, however, that sufficient "safeguards" existed for "controlling the danger of nonneutrality" (JA 67a) and that in imposing what he viewed as a "flat ban" on the sale of time the networks had abused the broad discretion granted them (JA 67-68a).

Reasons for Granting the Writ

The Decision Below Raises Significant and Recurring Constitutional Issues Affecting the Federal Electoral Process and the Broadcasting System

The determination of the Court of Appeals that the FCC is to decide when a federal election campaign begins and whether an individual candidate must be granted access to broadcast facilities, relying in large part on the Commission's evaluation of whether a broadcaster has taken proper account of an individual candidate's needs, places

the Commission in a central, even decisive role in the electoral process. Whether Congress intended to confide such a role to the FCC and, if so, whether such a role is a constitutional one, are questions of enormous significance for both the electoral process and the broadcast system generally.

The decision of the Court of Appeals represents the first detailed federal construction of Section 312(a)(7) and the FCC's role in implementing the provision. In his opinion for the Court of Appeals, Judge Bazelon aptly characterized the issues posed by the FCC's implementation of the statute as serious and far-reaching in an era where "it would be hard to overestimate the importance of television to our political processes" (JA 12a). The court's observation that "the issue is the interpretation of a statute that impacts upon the electoral process" where "fragile rights are concerned" and that "it is certain that the parties will confront each other in this situation again" (JA 53a) are, we submit, compelling considerations which warrant consideration by the Court at this time of the issues presented in this petition.

These were the considerations which troubled and divided the panel as reflected in the separate concurrence of Judge Tamm; Judge Tamm, while concurring in the opinion of the panel which heard the appeal, believed that the Commission decisions not only raised "grave first amendment concerns" (JA 56a) but had come "perilously close" to being unconstitutional (JA 58a). This troubled too the members of the Commission who considered the Carter-Mondale Committee complaint. Each of the Commission's two rulings was decided along party lines by 4-3 votes; indeed one of the four Commissioners in the majority observed that he believed the statute should be stricken on First Amendment grounds (JA 108a), a question which the other members of the bare majority avoided deciding.

Many of the premises of the Court of Appeals decision are indeed subject to serious challenge. Any appellate court decision is dubious which disposes quite so easily of the previously expressed conclusion of this Court that Section 312(a)(7) is a "codification" of prior law (*see* pp. 26-27, *infra*). So is an opinion which simply dismisses the serious questions raised concerning the unprecedented and central role given the Commission in the political process.

The Commission hereafter is to determine "objectively" when each political campaign for each federal nomination or election has begun. The origin of the Commission's expertise in this area or the source of the Congressional delegation of such power is nowhere defined by either the Court of Appeals or by the Commission;* indeed the Commission's role in this respect was not even articulated until its supplemental opinion.** The potential for the Commis-

---

* Congress is given the power to regulate elections of members of the House and Senate under Article I, Sections 4 and 5 of the Constitution; its powers with respect to setting the time of Presidential elections are set forth in Article II.

** The Broadcast Bureau of the FCC had earlier stated, in a decision unchallenged by the Commission until the Supplemental Order, that an assessment of when a campaign was sufficiently underway as to warrant access time was confided to broadcaster discretion. In *Anthony R. Martin-Trigona*, 66 F.C.C.2d 968 (1977), *petition for reconsideration denied*, 67 F.C.C.2d 743 (1978), the FCC's Broadcast Bureau concluded that:

> "A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence." 66 F.C.C.2d at 969.

Similarly, in dismissing the appeal of the senatorial candidate in that case, the Commission itself stated in the most general terms possible that "a candidate is not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes . . ." 67 F.C.C.2d at 746.

For the Commission to have found NBC's conduct to be unreasonable for failing to adhere to standards first announced in

[*Footnote continued on following page*]

sion's decision to alter rather than simply reflect the realities of the campaign is apparent.

Under the ruling below, the FCC is, as well, to sit in judgment on whether the broadcasters have been sufficiently responsive to each candidate's statements of his need for the time sought. It was in response to these holdings that Judge Tamm observed that:

> "[U]nlike the regulatory approaches upheld in *Red Lion,* section 312(a)(7) deals solely with candidates for federal political office; in evaluating the danger of government nonneutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests. . . . As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312 (a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners." (JA 63-64a)

[*Footnote continued from preceding page*]

the Supplemental Order says much about the nature of the Commission's approach in deciding this case. The Court of Appeals lightly dismissed the earlier rulings as "dictum" (JA 26a, n.59). The court nowhere deals with the fact that in its initial decision in this very case the FCC majority dealt with the question of timing as one of reasonable licensee discretion (see JA 94a). This is but one example of how shifting standards, such as those which plagued the case below, can create particularly acute problems, especially where, as here, the interpretation placed upon a statute thrusts an administrative agency directly into the political maelstrom.

And, again, that:

> "The danger of government nonneutrality under section 312(a)(7) is exacerbated by the Commission's emphasis, in its standards governing the right of access, on the 'individual needs' of the candidate. Whether and to what extent a candidate is entitled to broadcast access depends on a weighing of his 'individual needs' against the other relevant considerations detailed by the Commission. This evaluation may lead to a determination, for example, that a candidate requesting a half hour for a particular purpose may instead be entitled to only fifteen minutes, *see* Maj. Op. at 35-36; another candidate, on the other hand, may be found entitled to the full half hour that he seeks.
>
> "Thus, without regard to any prior broadcast coverage of opposing candidates, an agency of the federal government is authorized to decide, based in significant part on the candidate's 'individual needs,' whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves. Although the Commission's standards are designed to apply neutrally to all candidates, and call for a rather deferential oversight of broadcaster determinations, there is nonetheless a much greater potential than in *Red Lion* for government favoritism, perhaps wholly unintentional, of particular speakers and ideas" (JA 62-63a; footnote omitted).

Judge Tamm's own conclusion was that these difficulties, threatening as they obviously are, could be surmounted if "both at the broadcaster level and before the Commission on review, analysis of the 'individual needs' factor . . . focus[es] solely on the candidate's needs *as stated by the candidate*. . . ." (JA 67-68a). Yet, if the networks and more importantly the Commission are not to assess or

weigh each candidate's needs, the needs criteria would seem to be meaningless: any candidate who requests time obviously believes he "needs" it. How then are these "needs" to be a factor in any evaluative process (JA 88) if some entity other than the candidate is not to assess the legitimacy of these needs? And if the networks—and, worse yet, the Commission itself—*are* required to engage in some kind of political weighing process (JA 88a), what becomes of the neutrality which concerned Judge Tamm? The Commission established, as a crucial criterion in determining whether or not "reasonable access" has been afforded, a concept which is either meaningless or dangerously involves the FCC in the political thicket. In either event, such approach poses an unacceptable threat to the neutrality of the political process or to the supposed deference to broadcaster judgment which the court below stated was crucial.

In this case President Carter stated his desire to commence his campaign with a half-hour broadcast; presumably he best knew his needs. A lesser known candidate might as reasonably have requested—and "needed"—two hours. George Bush began his campaign two years before the 1980 election. Presumably this reflected his own realistic assessment of his needs. How is a broadcaster to "evaluate" (JA 88a) this candidate's view of his own "need?" What of the even greater needs for exposure of minor party candidates? The Commission and the court rejected any uniform approach to all candidates, insisting instead on an individualized approach tailored to each candidate, with the Commission sitting in review. Unlike the equal time provisions, no objective, mechanical criteria exist under the Commission's approach as approved by the court; instead each broadcaster is to evaluate each request in light of each candidate's needs, the number of prior requests and the multiplicity of candidates who will seek

equal time; this judgment will then be subjected to Commission review.*

It is difficult to imagine a less attractive area for the Commission to enter than this. Inevitably, as Chairman Ferris conceded during the hearing in this matter, access decisions—by government—would involve a "value judgment" about a candidate and his campaign and would require consideration of campaign strategies (Transcript of Hearing of Nov. 20, 1979, p. 11). Determining access based on political factors such as these is simply not permitted under the Constitution. As this Court in *Buckley* v. *Valeo*, 424 U.S. 1, 57 (1976) stated,

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. . . . [The government may not] retain control over the quantity and range of debate on public issues in a political campaign." (Footnote omitted)**

---

* The Court of Appeals conceded that if the FCC were to set a starting date for the campaign it would be "impermissibly involved" in the electoral process (JA 27a). Yet it then concluded that the agency's involvement was proper because, rather than setting a starting date for the campaign, the FCC was merely determining that a campaign had already begun. Since any decision that a campaign has already begun implicitly requires the recognition of a starting date, the court's use of the past tense did not lead it out of the dilemma the court itself had recognized.

** Congress recognized the impropriety of government interference with the electoral process when it enacted the Hatch Act, 5 U.S.C. § 7324 (1976). The Supreme Court, in *United States Civil Service Commission*, v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), upheld the Act as constitutional, characterizing Congress' judgment to be that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." (413 U.S. at 565)

Not only does the decision below improperly intrude upon the electoral process, it does so in a fashion which maximizes the disruption of the broadcast system and the "delicately balanced" system of regulation "to which this Court has referred." See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973).

As interpreted by the Commission and the Court of Appeals, Section 312(a)(7) imposes one of the most far reaching and intrusive restrictions on broadcaster editorial judgment ever sanctioned by the federal government in the name of "access". As interpreted below, the section requires a broadcaster to make time available to candidates for Federal office in units of time demanded by the candidate and within a narrow range of dates specified by the candidate. The specific program which *must* be broadcast is one selected by the candidate alone, one which the broadcaster may not edit or exercise editorial supervision over in any way.* The obligation attaches regardless of the nature or the extent of coverage otherwise given to the election campaign at issue by the broadcaster. Significantly, the Commission policy here requiring that access be given to specific candidates in accordance with their needs is *not* one which, like the personal attack doctrine dealt with in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (or Section 315) is triggered by other programming which the broadcaster has chosen to present; nor is it, like the Commission's general public interest standard, an obligation which can be met in a variety of fashions within the reasonable judgment of the broadcaster. *See Humphrey for President Campaign*, 34 F.C.C.2d 471 (1972).

---

* *See Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

On the contrary, it is an explicit requirement to initiate specific programming under the threat of Commission sanction. Moreover, that initiation will itself have further and substantial programming consequences under Section 315 and other sections of the Communications Act.* There is no judicial precedent for such total evisceration of broadcaster judgment; it is thus easily understandable that one member of the Commission's one vote *majority* expressly indicated his belief that Section 312(a)(7) violated the First Amendment (*see* separate statement of Commissioner Quello at JA 108a) and that Judge Tamm expressed substantial concern about the constitutional issue. As so interpreted below, the mandatory access provisions of Section 312(a)(7) raise substantial constitutional questions. Moreover, even if, standing alone, these provisions could be sustained, taken as part of the overall regulatory scheme, including existing obligations under Section 315 and other sections of the Communications Act, Section 312 (a)(7) as interpreted by the Commission and the court below substantially alters the "delicate balance" (*Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102) struck to accommodate broadcaster's First Amendment rights with the other needs of the broadcast system identified by Congress and the courts.

---

* The Court of Appeals recognized in *Kennedy for President Committee* v. *FCC*, No. 80-1482, *supra*, that unlike Section 312 (a)(7) as interpreted by it, "[n]othing in Section 315 and its exemptions calls for consideration by the Commission or a broadcaster of the needs of a candidate requesting equal opportunities. A contingent right of access to 'equal opportunities' is self-executing and is mandated for all legally qualified candidates in response to any appearance by an opposing candidate . . ." (Slip Op. at 17n). It thus has read the two provisions together as virtually requiring access upon demand by *any* candidate once a determination has been made that a *single* candidate "needs" the time.

CBS v. *DNC* describes in detail a unique regulatory system designed to take account of a variety of interests, including the broadcasters' own significant First Amendment rights. The "delicately balanced" system (412 U.S. at 102) which has evolved in the wake of the Congressional rejection of a common carrier approach* in favor of private journalistic control involves broad journalistic freedom and discretion, subject to ultimate public accountability.

So sensitive is the balance that even minimal additions to the obligations imposed by the fairness doctrine—a doctrine involving far less direct interference with broadcaster decisions as to what to broadcast and when than the matters at issue here—have been recognized as sufficient to overthrow the whole. *See Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288, 296-97 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 934 (1976). In that case, the Court of Appeals itself declined to interpret the Public Broadcasting Act in a fashion which would "threaten to upset the constitutional balance struck in *CBS*" in the absence of a clear legislative intent compelling such reading of the statute under construction. Here, the Commission's interpretation would have precisely that effect, compelling broadcasters to program at governmental direction and then to incur specific additional programming obligations under the equal time requirement of Section 315. Such an interpretation tilts the carefully achieved balance and strips the broadcaster of control over significant amounts of broadcast time. Such a result is of dubious constitutionality and surely should not be "presumed" to have been Congress' intent in the absence of far clearer evidence, espe-

---

* Section 3(h) of the Communications Act, 47 U.S.C. 153 (h) (1976) explicitly provides that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier."

cially when, as here, evidence exists suggesting that Congress intended no such result (*see* the following section of this Petition).

Providing the public with full information about Presidential and other federal elections is, of course, a vital goal; Section 312(a)(7), however, need not be interpreted to eviscerate broadcaster judgment to attain that goal. There is no contention here, for example (nor could there be) that Mr. Carter has not received enormous amounts of coverage on the NBC Network—both as President and as a candidate for reelection. By the same token, there is no contention that NBC has not honored equal time obligations when they have come into play. Nor is there a contention that NBC has not, in past elections, sold substantial blocks of time to Presidential candidates well in advance of the conventions and primaries. The Commission and the Court of Appeals have, nonetheless, interpreted the statute to allow Presidential candidates to dictate when time must be sold and the length of time which must be sold; such interpretation is not consistent with the legislative history and is entirely unnecessary to accomplish the legislative goal of ensuring that the electorate be fully informed. By adopting an interpretation which infringes on First Amendment rights to an extent far greater than the goal to be accomplished requires, the Commission's rendering of Section 312(a)(7) runs afoul of the requirement that any limitation of constitutional rights—even in the service of important goals —be accomplished by the least restrictive means. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC,* 593 F.2d 1102, 1115 (D.C. Cir. 1978). Whatever else may be said of it, the interpretation of the statute adopted below is hardly that.

The Decision Below Is Contrary to the Legislative History of Section 312(a)(7)

All these consequences could and should have been avoided by an interpretation of the statute far more consistent with its evident purpose and one with firmer ties to independent goals unrelated to the partisan political process; the plain fact is that the determinations below are flatly inconsistent with the express purpose of the legislation.

While the legislative history of Section 312(a)(7) is limited, it is at least clear that in enacting the Federal Election Campaign Act of 1971, Congress intended to *reduce* campaign costs;* the legislation included a provision which, the legislators hoped, would shorten media campaigns.** One of the few statements concerning the purpose of the provision which became Section 312(a)(7) is that it was intended to prevent incumbents from taking

---

* *See* S.Rep.No. 96, 92d Cong., 1st Sess. 20-22, 31-33 (1971) *reprinted in* [1972] U.S. Code Cong. & Ad. News 1774-75, 1784-86; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 151 (1971) (remarks of Senator Pastore).

** 47 U.S.C. § 315(b)(1) (1976) established periods of 60 days before a general election and 45 days before a primary election during which a licensee would be prohibited from selling broadcast time to candidates at more than the lowest unit rates. Senators Prouty, Cooper and Scott noted that "[e]veryone agrees that political campaigns tend to be too long. We are hopeful that the 45- and 60-day provisions will encourage shorter campaigns." S.Rep.No. 229, 92d Cong. 1st Sess. 118 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News at 1855. To the same effect, *see Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 393 (1971) (remarks of Chairman Magnuson and Senator Hart); *id.* at 619 (remarks of Senator Pastore) S.Rep.No. 96, 92d Cong., 1st Sess. 28, 34 (1971) *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781, 1787; 117 Cong. Rec 30075 (1971) (remarks of Senator Dole).

unfair advantage of their greater media exposure.* Not one of these goals was even addressed by the Court of Appeals in its opinion. The decisions below have had the anomalous effect of thwarting all three legislative purposes at once, for the decisions ensure lengthier campaigns, more costly campaigns and more broadcast time for incumbents, not to say more potential for control by incumbents over the entire electoral process.

The decision below also had the effect of creating an individual candidate right of access—a right not elsewhere granted and one which is of dubious propriety. The FCC's policy prior to the enactment of Section 312(a)(7) was to appraise a broadcaster's overall coverage of political campaigns under the traditional "public interest" standard. The Commission had refused to interpret that standard to require that broadcasters generally provide access to specific federal, state, or local candidates, apart from equal-time and "personal attack" requirements. *See,*

---

* The co-sponsors explained:

> "Our bill . . . requires that broadcasters may not refuse to sell 'reasonable' amounts of political broadcast time to all legally qualified candidates for public office. While we recognize the pitfalls in employing the word 'reasonable', we wish to make clear our intent. We want to assure that those few broadcasters who happen to favor incumbent candidates cannot continue to do so by forbidding the sale of time to the opposition as well." *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 348 (1971) (Statement of Senators Scott and Mathias).

See also id. at 525 (testimony of Attorney General Kleindienst noting that the purpose of § 315 was to reduce the incumbent's media advantage).

In view of the sponsors' concern with the media advantage accorded incumbents, it is particularly baffling that the FCC expressly elected to exclude the media coverage of incumbents from their assessment of a candidate's "needs" (JA 130-31a).

e.g., Humphrey for President Campaign, supra, 34 F.C.C.2d at 472.

The only legislative history (other than concern expressed about the advantages of incumbents) which specifically relates to Section 312(a)(7) indicates that it was intended to underscore then-current FCC practice.* The Senate Committee on Commerce, after adding the provision which was to become Section 312(a)(7) to the bill which it recommended be passed (which at that time also included a provision eliminating the "equal opportunities" requirement of Section 315), commented twice on the provision. The first reference said:

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC *should continue* to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. *Certainly no diminution* in the extent of such programming should result from the enactment of this legislation.
>
> "In order to emphasize the public interest obligation inherent in making broadcast time available to

---

* Statements in the legislative history of the Federal Election Campaign Act concerning the goal of greater candidate access to broadcast time did not refer to or relate to Section 312(a)(7). Rather, that goal was to be accomplished by cost-reducing measures and a partial repeal of the equal time requirements of § 315. *See* S.Rep.No. 96, 92nd Cong., 1st Sess. 2-3, 20-21 (1971) *reprinted* in [1972] U.S. Code Cong. & Ad. News at 1774; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before Subcomm. on Communications of Senate Comm. on Commerce,* 92d Cong., 1st Sess. 152 (1971). There was a general consensus among the members of the Senate Committee and those who testified before it that § 315 had resulted in candidates receiving "no time" rather than "equal time." *See, e.g.,* S.Rep.No. 96, *supra,* at 25-26, 34, *reprinted in* [1972] U.S. Code & Ad. News at 1779, 1787; S.Rep.No. 229, 92d Cong., 1st Sess. 116-17 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1854-55.

candidates covered by the spending limitation in the legislation, S. 382 contains an express provision to this effect." S.Rep.No. 96, 92d Cong., 1st Sess. 28 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781-82 (emphasis added).

The Committee's second reference to the provision also referred approvingly to then-existing FCC practice:

"Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a l[e]gally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.

"The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the comm[unities] of license. The Federal Communications Commission *has recognized* this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (1960)." *Id.* at 34, *reprinted in* [1972] U.S. Code Cong. & Ad. News at 1787* (emphasis added).

---

* The provision was originally included as part of S.956, a companion bill to S.382, which was the bill finally adopted. *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, S.956 Before Subcomm. on Communications of Senate Comm. on Commerce*, 92d Cong., 1st Sess. 132-34 (1971). The sponsor's general explanation of his purpose also confirms the view that it was not intended to constitute a significant departure from FCC practice:

"[T]here is a firm declaration of congressional intent that broadcasters have certain obligations to the public and to political candidates during election campaigns. Most of this language is excerpted directly from existing Federal Com-

[*Footnote continued on following page*]

The only evidence of legislative intent is thus that the statute was meant to provide a new penalty and to underscore the obligation of broadcasters to provide time to political candidates. There is *no* indication that Congress intended to create a new right of access, certainly not one which requires the Commission to thrust itself into decisions as to the commencement of campaigns and which requires it to assess the broadcaster's "weighing" of each candidate's needs.*

[*Footnote continued from preceding page*]

munications Commission regulations and from Federal court decisions affecting the operations of broadcasters. *I am simply codifying this language, thus making it clear, without specific congressional regulation, that Congress is dead serious in its belief that broadcasters must deliver the goods in the public interest. If past performance is any indicator, I am sure they will." Federal Election Campaign Act of 1971: Hearings on S.382 Before Subcomm. on Privileges and Elections of Senate Comm. on Rules and Administration*, 92d Cong., 1st Sess. 117-18 (1971) (Statement of Senator Scott; emphasis supplied).

* In support of its contrary interpretation, the Court of Appeals relied, to some extent, upon the fact that Section 312(a)(7) applies only to federal candidates. It reasoned that "[t]his is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine" (JA 16a). In point of fact, there are other evident reasons for the limitation. First, as noted above, the provision was originally introduced as a limited counterweight to repeal of Section 315; the proposed repeal of that section, however, pertained only to federal candidates *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Sub-Comm. on Communications of The Senate Comm. on Commerce*, 92d Cong., 1st Sess. 11-14, 53 (1971). More generally, the legislation of which Section 312(a)(7) is but one part was considered constitutionally valid only to the extent it related to federal candidates; it was thought that Congress should not affirmatively enact legislation affecting the states' political campaigns. S. Rep. No. 96, 92d Cong., 1st Sess. 32, *reprinted in* [1972] U.S. Code Cong. & Ad. News at 1785; S. Rep. No. 229, 92d Cong., 1st Sess. 99-103 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News at 1839-42.

The Court of Appeal's decision as well as the orders of the Commission ignore clear statements of Congress to this effect. According to the key spokesmen for the legislation, their goal was not to benefit any individual candidate, but the public and the electoral process.* It is the difference between an individual candidate right of access, which the Commission and the court below fashioned, and the previously recognized and generally enforced obligation of broadcasters to sell time to political candidates generally which has shaped the present dispute and raises questions relating to the electoral process and the First Amendment. The view of the Commission, for example, that individual candidates are the "intended beneficiaries" of the legislation doubtless resulted in its use of the subjective criterion of an individual candidate's "needs" as a determining factor. By making an "individual right" the focal point of its view of the statute, rather than looking to the public interest or the campaign as a whole, the Commission and the court rejected the evenhanded approach followed by the Commission in the past, one which properly focused on whether the licensee was providing adequate amounts of time generally for political candidates.

The need for *ad hoc,* and ultimately subjective assessments concerning candidate "needs", "rights of access", and the starting date of such an amorphous concept as a "national campaign" would not have been required by the interpretation of the statute which the FCC itself had previously urged upon this Court and which this Court had itself accepted.

---

* *See* S.Rep.No. 96, 92d Cong., 1st Sess. 20-21, 31-33 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773-74, 1784-86; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 151 (1971) (Statement of Senator Pastore).

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), the FCC argued that the public interest standard with respect to political broadcasts had been codified by enactment of Section 312 (a)(7). This Court, in its opinion in that case, noted that Section 312(a)(7) was essentially a codification of the FCC's interpretation of the public interest requirement:

> "In 1959, as noted earlier, Congress amended § 315 (a) of the Act to give statutory approval to the Commission's Fairness Doctrine. . . . Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license 'for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.' . . . This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates." (412 U.S. at 113-14 n. 12)

The Court of Appeals rejected this language as *dictum*, stating that "[i]n light of the plain language and statutory history of Section 312(a)(7), we find that *CBS* v. *DNC* is not controlling here" (JA 20a). These pronouncements, to say the least, are stunningly swift ways for a court to dispose of the FCC's unprecedented action in this case, not to mention a recent pronouncement of this Court. It clearly puts the Court of Appeals in conflict with the prior position of this Court, as well as Congress' expressed intent.

• • •

The decision of the Commission, affirmed by the Court of Appeals, construes Section 312(a)(7) in a fashion inconsistent with its legislative history: the reading given

the statute below pursues goals never considered by the statute's draftsmen and frustrates the goals which were envisioned. In so doing, that interpretation undoes the delicate balance of the broadcast regulatory system and thrusts the Commission directly into the electoral process. That process lies at the heart of our Constitutional framework and a threat to its neutrality demands prompt and careful attention.

For these and the other reasons set forth above it is respectfully submitted that a writ of certiorari should be issued to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Attorneys for Petitioner
National Broadcasting Company, Inc.

Of Counsel:

HOWARD MONDERER
Vice President, Law
National Broadcasting
Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

August 13, 1980

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . "

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "

Article I, Section 2, clause 1 of the United States Constitution provides:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

The Seventeenth Amendment to the United States Constitution provides in pertinent part:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote."

Article I, Section 4, clause 1 of the United States Constitution provides:

> "The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but

the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing Senators."

Article I, Section 5, clause 1 of the United States Constitution provides:

"Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties, as each House may provide."

Article I, Section 8 of the United States Constitution provides in part:

"The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrythereof."

Article II, Section 1, clauses 1-2 of the United States Constitution provide in part:

"The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and together with the Vice-President, chosen for the same Term, be elected, as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,

equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The Twelfth Amendment to the United States Constitution provides in pertinent part:

"The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least shall not be an inhabitant of the same state with themselves. . . . The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. . . ."

Article II, Section 1, clause 4 to the United States Constitution provides:

"The Congress may determine the Time of choosing the Electors and the Day on which they shall give their Votes, which Day shall be the same throughout the United States."

Section 3(h) of the Communications Act, as amended, 47 U.S.C. §153(h) (1976), provides in pertinent part:

"a person engaged in . . . broadcasting shall not . . . be deemed a common carrier."

Constitutional and Statutory Provisions Involved

Section 312(a)(7) of the Communications Act, as amended, 47 U.S.C. § 312(a)(7) (1976) provides:

> "(a) The Commission may revoke any station license or construction permit—
>
> • • •
>
> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Act of Oct. 15, 1974, Pub.L.No. 93-443, 88 Stat. 1278 provides:

> "Title I of the Federal Election Campaign Act of 1971 is repealed."

Section 315(a) of the Communications Act, as amended, 47 U.S.C. § 315(a) (1976) provides:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate, on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

see 80

207